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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,

Petitioner,

—v.—

FIRST UNITARIAN CHURCH OF SALT LAKE CITY, UTAHNS FOR FAIRNESS, and UTAH NATIONAL ORGANIZATION FOR WOMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

This case arises out of the sale of one block of Main Street in downtown Salt Lake City to the Church of Jesus Christ of Latter-day Saints ("LDS," the petitioner). The sale was conditioned on the Petitioner's agreement to build a park-like pedestrian plaza (the "Plaza") on the property. To ensure that the Plaza would anchor the north end of Main Street and funnel pedestrian traffic between the residential neighborhoods located immediately to the north and the central downtown commercial district located immediately to the south, the City prohibited petitioner from erecting any perimeter wall or fences and reserved an easement providing for public access to and passage across the Plaza twenty four hours a day, seven days a week. Sidewalks have been constructed for this purpose. The sale of a premier downtown street essential to the flow of traffic marks this case as virtually unique. It is even more unusual because the easement securing the public's right of way is written in such a way that First Amendment activity is prohibited on the sidewalks – except for activities undertaken or approved by the petitioner. In fact, the City delegated to LDS officials the broad power to regulate even clothing or political buttons worn by pedestrians that contain any message petitioner, in its unfettered discretion and according to its own sectarian standards, might deem "offensive." Respondents filed this case to prevent enforcement of the restrictions on First Amendment activity and to ensure that responsibility for regulating activities on the easement rested with City, *not* LDS, officials.

The relevant facts in this case are not in dispute. The circumstances involving the history, sale, construction, location, use, and function of the plaza are accurately described in the opinion below. *First Unitarian Church of Salt Lake City v. Salt Lake City Corporation*, 308 F.3d 1114,

1117-1120 (2002). The procedural history in this case is also accurately described therein. The following additional findings made by the court below are set out here because they provide the factual underpinnings for the court's conclusion that the "new" sidewalks that now pass over LDS property are by design and Deed legally indistinguishable from the old sidewalks for purposes of public forum analysis and the First Amendment:

- The City previously permitted public expression in this area when it was a public sidewalk abutting Main Street. *Id.* at 1129-30;
- The actual purpose and use of the easement is a pedestrian throughway for the general public. It provides pedestrian passage and forms part of the downtown pedestrian transportation grid. In this respect, it is identical to the sidewalks along that portion of Main Street previously served. *Id.* at 1026, 1030;
- The City's stated purposes for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a buffer closed to automobile traffic to the residential area to the north of the Plaza and the business areas to the south. *Id.* at 1026;
- The easement was particularly important to the City as a means of preserving and encouraging pedestrian traffic. It was specifically retained in order to preserve and enhance the pedestrian traffic grid in downtown. *Id.*;
- The easement was central to the role the City envisioned it playing in the character and development of Salt Lake City. *Id;*

- The City's actions approving the sale and resulting property ownership structure were specifically designed to ensure these aims were accomplished, and the pedestrian easement was central to these goals. The sale was expressly contingent on the retention of a perpetual easement requiring that the property be "planned and improved" so as to "maintain, encourage, and invite public use." In addition, the reservation contains a right of reverter in favor of the City enforceable if the property is not used for the purposes set forth in the Deed and easement. Finally, the City would not have agreed to the sale but for the easement. *Id.;*

- To the extent individuals with Church business enter onto the Plaza, this is not the only use or function of the property, or the purposes for which it was designed and intended to function. It is intended, rather, for pedestrian passage and is distinguishable from the types of walkways that merely provide ingress and egress to government facilities. *Id.* at 1127;

- To the extent the walkways provide access to Church facilities as an end destination for tourists, the former sidewalks along Main Street similarly provided tourists with the means of assessing portions of Church facilities. *Id.* at 1030;

These findings unquestionably support the lower court's conclusion that the public's right of way over the sidewalks secured by the easement has all the objective attributes of a traditional public forum. These facts also support the court's conclusion that the sidewalks have not been stripped of that status because of the changes in legal title or appearance, or because of limiting language in the

easement that purports to make those sidewalks something other than they actually are.[1]

REASONS FOR DENYING THE WRIT

This case involves a still-evolving dispute about the scope and legal effect of a recorded easement contained in a real property contract requiring unobstructed pedestrian use on the sidewalks that run parallel to a section of Main Street and that are constructed over the property of the adjacent landowner. Without citing any authority from this Court or the courts of appeal, petitioner maintains that the property is exempt from First Amendment constraints. Petitioner is assuredly wrong. Public highways and streets are often easements held for the public, with title to these property interests remaining in the abutting property owners. Holding that an easement cannot be a First Amendment forum would lead to the absurd conclusion that many public streets and

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[1] Both petitioner and the City neglected to inform the Court that the issues surrounding the validity and enforcement of the easement in this case continue to develop. First, there is an unresolved dispute between the Church and the City about the effect of the Tenth Circuit's decision on the continued validity of the Easement. The two parties disagree whether the easement survives the decision under the terms of a severability clause in the Deed. Ignoring the plain language of the clause, which provides that if any "restrictions" are held unconstitutional the remaining provisions of the Deed stand, the Church argues that the easement itself must be severed. The City (correctly in our view) maintains that only the First Amendment restrictions need be severed, leaving the easement in place. *See* 308 F. 3d at 1026 n.8. Second, and of perhaps greater significance, there are events underway that will likely have a substantial impact on this case and could well moot it. The Mayor's office has filed a petition with the City planning authority to abandon the easement. The petition appears to have substantial political and public support and is working its way through the political and regulatory process. The plan being proposed is reported on the City's website (http://www.ci.slc.ut.us/mayor/plaza). These developments further militate against this Court's weighing in on issues that are not even settled and may disappear.

sidewalks are not traditional public fora, a holding that is contrary to decades of this Court's jurisprudence.

Despite the absence of authority supporting its position, petitioner advances three reasons for granting *certiorari* in this case. First, petitioner claims there is a conflict with a decision of the Second Circuit over the proper application of public forum analysis in a case that does not involve a traditional public forum or a sidewalk easement. Petitioner also claims there is a narrower conflict with the Nevada Supreme Court over the legal effect of an easement. Second, petitioner asserts that the Court should grant *certiorari* to undertake the impossible task of addressing the myriad factual circumstances under which the government may validly close a public forum. At a minimum, petitioner submits that the Court should defer consideration of that question pending the outcome of *Virginia v. Hicks*, 123 S.Ct. 990 (2003) (granting petition for *certiorari*). Finally, petitioner asks that *certiorari* be granted because of the "significant constitutional and practical problems" allegedly created by the Tenth Circuit decision. We respectfully submit that none of petitioner's claimed reasons for review have merit, and that the petition should be denied for the reasons set forth below.

1. Contrary to petitioner's contention, there is no conflict among the circuits on the standard for determining whether a public forum exists. Specifically, there is no merit to petitioner's claim that the decision below conflicts with the Second Circuit's recent decision involving New York's Lincoln Center for the Performing Arts. *Hotel Employees & Rest. Employees Union Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002). The cases were decided on completely different facts and do not raise a dispute over the applicable legal principles, but instead, they demonstrate nothing more than different outcomes arising from the application of established legal principles. The Second Circuit opinion not only

distinguishes this case on its facts, but also relies on an earlier Tenth Circuit decision involving the Denver Center for the Performing Arts – a case the Tenth Circuit convincingly distinguished from this one, demonstrating that no conflict exists. Petitioner also points to an alleged conflict with the Nevada Supreme Court on the question of whether a sidewalk easement over private property can be deemed a public forum for First Amendment purposes. But that alleged conflict is equally illusory. The issue identified by petitioner was not definitively resolved by the Nevada Supreme Court. Nor are we aware of any other federal or state authority that supports the asserted conflict on this narrower issue.

2. There is no overarching reason for this Court to grant *certiorari* in an effort to address the multitude of different circumstances under which the government might properly close a public forum. Petitioner does not even claim there is a conflict in the circuits on that question, and none exists, because those circumstances are necessarily fact-specific. While interesting First Amendment issues might arise in a case where the government transferred title to property without the reservation of an easement, this case does not remotely present those facts or those issues. To the contrary, the government here reserved an easement expressly for the purpose of maintaining the property as a pedestrian thoroughfare, and the sidewalks on which the easement is reserved and maintained are private in name only. Finally, there is no reason to hold this petition pending the outcome in *Virginia v. Hicks,* 123 S. Ct. 990 (2003) (02-371), as petitioner alternatively suggests. The result in this case is unlikely to change no matter how that case is decided.

3. No weight should be given to the petitioner's contention that the Tenth Circuit decision creates "significant constitutional and practical problems." Petitioner voluntarily agreed to keep the property open and accessible for pedestrian use and the City reserved an easement

establishing a public right of way over the property. Traditional public fora, such as streets and sidewalks, are often easements held for the public. The fact that title to the underlying land rests with the adjacent property owner has never been a consideration in this Court's public forum cases. In fact, this Court's cases have long held that private property does not confer absolute dominion. Petitioner's reliance on the Establishment Clause as another example of the type of practical and constitutional problems that flow from the opinion below is equally unavailing. It turns the Establishment Clause on its head to assert, that the City cannot regulate the easement without violating the Establishment Clause, but that the Church can. The Establishment Clause is not violated merely because the City regulates the sidewalks and streets adjacent to LDS Church property any more than it is violated when the District of Columbia government regulates the sidewalks adjacent to the National Cathedral. If anything, the Establishment Clause is violated under an arrangement that vests the Church with the authority to decide who can and cannot use a public easement, based solely on its own sectarian standards, and to exercise editorial control over public speech that takes place on the pedestrian right-of-way guaranteed by the easement.

I. THIS CASE DOES NOT INVOLVE A CONFLICT WITH OTHER CIRCUITS

Petitioner attempts to manufacture a conflict between the Tenth Circuit and the Second Circuit. That attempt fails because the two courts of appeal are in total agreement concerning the proper application of the public forum doctrine.

Applying this Court's well-established public forum law, the Second Circuit held in *Hotel Employees* that the plaza in front of Lincoln Center is not a public forum because it was not designed to serve as a public thoroughfare. 311 F3d at 550-52. Applying the same legal

principles, the Tenth Circuit similarly held that the plaza in front of the Denver Performing Arts Center is not a public forum because it was primarily designed to provide ingress and egress to the concert venues. *Hawkins v. City and County of Denver*, 170 F.3d. 1281, 1287-88 (10th Cir. 1999). It is hardly surprising, therefore, that the Second Circuit cited *Hawkins* with approval when it decided *Hotel Employees*. But it is equally unsurprising, and more legally relevant, that the Tenth Circuit easily distinguished *Hawkins* when it decided this case. What petitioner describes as a conflict is simply a reflection of the fact that the same principle applied to different factual circumstances will often lead to different results. Petitioner must show more than that to justify a grant of *certiorari*.

Unlike Lincoln Center, the property in dispute here involves a section of Main Street in downtown Salt Lake City that was sold to the Church and converted into a pedestrian plaza with the full understanding and agreement of the parties that the Plaza would continue to function as a conduit for pedestrian traffic incorporated into the City's transportation grid. The City reserved an easement over the property for this very purpose; indeed, that was a "central" element of the transaction from the City's perspective. By contrast, the Second Circuit concluded in *Hotel Employees* that the plaza outside Lincoln Center performs a different function. Whether one agrees or disagrees with that conclusion, it formed the basis for the Second Circuit's holding. Nothing in the Second Circuit's decision suggests any disagreement with the Tenth Circuit's holding that sidewalks that continue to function as a public thoroughfare by virtue of an easement should continue to be treated as a public forum for First Amendment purposes.[2] Indeed, as

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[2] *Cf. Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission* 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (observing that in the majority of jurisdictions, title to

this Court has observed, streets and sidewalks are the "archetype of a traditional public forum." *Frisby v. Schultz,* 487 U.S. 474, 480 (1988). Petitioner's quarrel is with the Tenth Circuit's premises, but that is entirely a factual dispute. Once the premise is accepted, the Tenth Circuit's public forum analysis is both unexceptional and entirely consistent with the Second Circuit's approach and with this Court's longstanding precedents.

If anything, the Lincoln Center case and a dozen other cases, as well, demonstrate that the lower courts fully understand the governing legal principles and are entirely capable of applying this Court's public forum doctrine to disparate facts. *See Hawkins*, 170 F.3d at 1287-88; *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695 (7th Cir. 1998) (sidewalks, plaza, and amusement park located on Navy Pier are not a public forum); *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999) (park-like mall on grounds of government complex is a traditional public forum); *Paulsen v. County of Nassau,* 925 F.2d 65 (2d Cir.

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some of the most traditional of public fora, streets, and sidewalks remain in private hands). *See also* 10 A E. Mc Quillin, Law of Municipal Corporations § 30.32 (3d ed. 1990). *See also* 518 U.S. at 827-28 (Thomas, J., concurring in the judgment in part and dissenting in part) (describing the common practice of formally dedicating land for streets and parks when subsidizing real estate for developments; "Such dedications may or may not transfer title, but they at least create public enforceable easements in the dedicated land. To the extent that those easements create a property interest in the underlying land, it is that government owned property interest that may be designated as a public forum.") (citiations omitted).

The Court of Appeals decision here proceded from this basic understanding of how title to streets and sidewalks is generally held in many jurisdictions. "[H]olding that an easement cannot be a forum would lead to the conclusion that many public streets and sidewalks are not public fora. Public highways or streets are often easements held for the public, with title to these property interests remaining in abutting property owners." 308 F. 3d at 1023 citing 39 AMJUR.2D *Highways, Streets, & Bridges* 182-83 (1999) (citations omitted).

1991) (sidewalks around sports complex are a designated public forum); *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.*, 257 F.3d 937 (9th Cir. 2001) (sidewalks in Las Vegas gaming district are a public forum); *Henderson v. Lujan*, 964 F.2d 1179 (D.C. Cir. 1992) (sidewalks surrounding Vietnam Veteran's Memorial are a public forum); *Lederman v. United States,* 291 F.3d. 36 (D.C. Cir. 2002) (sidewalks outside Capitol building are a public forum). Hence, not only is there no conflict among circuits, there is no confusion in the lower courts over the governing legal standards or a need for further clarification by this Court.

In an effort to create a conflict, petitioner emphasizes its own version of the facts, but its recitation is both incomplete and misleading. There can be no doubt that the Lincoln Center case turned on a number of limiting factors conspicuously absent from any mention in the petitioner's brief, including most importantly the fact that the plaza forecourt "does not form part of the City's transportation grid in the way that traditional streets and sidewalks do." 311 F.3d at 550. The Second Circuit also observed that the ability of pedestrians to cross the plaza as a "shortcut between surrounding streets is merely an incidental feature of its principal function as the entrance plaza for the Lincoln Center complex." *Id.* As the Second Circuit itself pointed out, these facts were critical to its decision and, in its view, clearly distinguished Lincoln Center from this case. *Id.* at 551-52. *See also Hawkins,* 170 F.3d at 1287-88 ("[T]he galleria does not form part of Denver's automotive, bicycle or pedestrian transportation grid, for it is closed to vehicles and pedestrians generally do not use it as a throughway to another destination. Rather, the galleria's function is simply to permit ingress to and egress from the DPAC's various complexes").

The factors cited by petitioner as creating a conflict cut against its argument. In discussing the Plaza's location,

function and purpose, the Second Circuit drew a comparison to the sidewalks under consideration in this case. The comparison erases the petitioner's alleged conflict:

> Thus, it is apparent that the Plaza's primary function and purpose is to serve as a pleasing forecourt at the center of a prominent performing arts complex, to facilitate patrons' passage into the events taking place in the arts buildings, and symbolically to promote the cultural arts to the benefit of the community. Although the Plaza's design clearly invites passers-by to stroll through or linger, the Plaza was not created primarily to operate as a public artery, nor to provide an open forum for all forms of public expression. *Cf. First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1125-27 (10th Cir. 2002) (holding that a portion of Main Street sold to church and converted into pedestrian plaza is a traditional public forum because by retaining easement for public passage, City intended to "encourage pedestrian traffic" and to "preserve and enhance the [downtown] pedestrian grid.")

Id. at 551-52. Petitioner provides no answer for the critical differences in the facts of the two cases.[3]

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[3] Petitioner also attempts to create a conflict by asserting that, unlike the Second Circuit, the court below did not give any weight to the City's intent not to create a public forum in this case. The Second Circuit only weighed this factor, however, because Lincoln Center did not involve a traditional public forum. It specifically acknowledged the principle followed by the Tenth Circuit that a traditional public forum is "open for expressive activity regardless of the government's intent." *Id.* at 551 n. 12 (quoting *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). *See First Unitarian Church*, 308 F.3d. at 1125. Thus, there is no disagreement between the Courts of Appeals on this point.

The distinguishing factors present in this case cited by the Second Circuit panel are not casual or accidental invocations. They go to the very heart of the public forum analysis. The actual purpose and use of the easement in this case is a pedestrian throughfare. This is not merely the use the City has in practice permitted, but also the expressed purpose for which the City reserved the easement. "The City's stated purposes for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a buffer closed to automobile traffic between the residential area north of the plaza and the business areas to the south." 308 F.3d. at 1126. While the City wanted to close the street to automobile traffic, "it simultaneously wanted to preserve and indeed encourage pedestrian traffic. The easement through the plaza was specifically retained in order to preserve and enhance the pedestrian grid in the downtown." *Id.* Unlike the forecourt at Lincoln Center, the easement was neither established nor functions solely for "ingress and egress to church facilities." *Id.* at 1127. Petitioner's attempt to draw a parallel to the description of how the forecourt at Lincoln Center functions is at odds with the findings in this case. The plaza here does more than provide access to those with Church business. The petitioner's suggestion to the contrary "does not capture the actual or articulated purpose of the easement, a pedestrian walkway for the public at large." *Id.* After reviewing the publicly and legislatively stated purposes of the easement, the court concluded that the easement exists "for pedestrian passage, it forms part of the downtown pedestrian transportation grid, and is open to the public." *Id.* at 1128.

In view of the obvious factual differences between how Lincoln Center and the Plaza in this case function, petitioner's argument that there is a conflict is incorrect. Petitioner's contention is further undermined by the fact that

the Second Circuit specifically discussed and distinguished this case, thus rejecting the claimed conflict on which petitioner now relies. Finally, the Lincoln Center case is fully consistent with the Tenth Circuit's earlier decision involving the Denver Performing Arts Center, thus further undermining the asserted conflict.

II. THIS CASE DOES NOT CREATE A CONFLICT WITH A HIGHEST STATE COURT THAT MERITS PLENARY REVIEW.

Petitioner's reliance on an alleged conflict between the Tenth Circuit and the Nevada Supreme Court is similarly misguided. On pages 15-16 of its brief petitioner argues that the Tenth Circuit's decision directly contradicts the Nevada Supreme Court's conclusions in *S.O.C. Inc. v. Mirage Casino Hotel*, 23 P.3d 243 (Nev. 2001). A review of that case demonstrates otherwise. The case was decided following a federal district court decision that held that the sidewalks running along Las Vegas Boulevard ("The Strip") were a public forum even though title to the property rested with the casino. As here, the sidewalks were encumbered by a public right of way. *Venetian Casino Resort v. Local Joint Executive Board,* 45 F. Supp.2d. 1027 (D. Nev. 1999), *aff'd,* 257 F3d 957 (9th Cir. 2001). *S.O.C.* was an *en banc* decision by six of the seven members of the Nevada Supreme Court. *Id.* at 244. Justice Leavitt voluntarily recused himself from the case. *Id.* at 251, n. 51.

While the Nevada Supreme Court voted 5 to 1 to uphold the preliminary injunction entered in favor of the casino, it was evenly split on the question of whether the sidewalk in question is a public forum. Writing for three members of the Court, Justice Young concluded that the sidewalk was not a public forum, despite the pedestrian easement. *Id.* at 247. The concurring opinion by Justices Maupin and Shearing agreed with the results but disagreed on the issue of the public forum status of the sidewalk.

> The basic question in this matter was convincingly settled in *Venetian Casino Resort v. Local Joint Executive board.* 45 F.Supp. 2d 1027 (D.Nev. 1999). In *Venetian*, the defendant unions obtained a permit to picket in a private pedestrian walkway fronting the Venetian Casino Resort. That sidewalk is directly across the street from, and in every relevant respect identical to, the properties at issue in the instant matter. The federal district court concluded that the Venetian property "was previously public, serves as a thoroughfare along a main public road, and serves the needs of the general public. As such, it falls within a very limited exception to the general rule that private property is not subject to the First Amendment." *Id.* at 1036. This exception must also apply here.

Id. at 252.

Justice Rose's dissenting opinion likewise treated the sidewalk as a public forum.

> The real property in question consists of two traditional sidewalks abutting Las Vegas Boulevard that are traversed daily by thousands who use the sidewalks as a principal thoroughfare along the City's most famous stretch of casinos, the Las Vegas Strip. By the very location and function of the sidewalks, I think it is impossible not to conclude that they serve as traditional public sidewalks. Similar thoroughfares, whether publicly or privately owned, have been recognized as public forums on which all First Amendment rights must be recognized and

> honored. Therefore, I disagree with the majority's conclusion that the area in question is not a public forum.

Id.

In light of the Nevada's Supreme Court's inability to come to any majority position concerning the status of the Mirage sidewalk, petitioner's argument that there is a concrete conflict between the Tenth Circuit and the Nevada Supreme Court is incorrect.[4] At most, this is a nominal conflict arising from an ambiguous decision decided in the context of an appeal from a preliminary injunction by a state supreme court located outside the Tenth Circuit. This is simply not the type of conflict—assuming any exists at all – that warrants this Court's intervention.[5]

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[4] Obviously aware of the limited reach of the Nevada decision, the petitioner argues that under Nevada law "the reasoning and holding of the plurality view is binding unless and until overruled by three or more justices of [the] court or an intervening act of the Legislature." *Craigo v. Circus-Circus Entrs. Inc.*, 786 P.2d 22, 28 n.7 (Nev. 1990) Pet. App. 15 n.5. That view was expressed in a plurality opinion itself and is of dubious precedential value. The concurring Justice in *Craigo* specifically rejected the position advanced by the petitioner here. *Id.* at 21 n.7 (Springer, J., concurring). We have found no other cases which have followed the unusual rule announced in *Craigo* and at least one case which repudiates it. *Coughlin v. Tailhook*, 112 F.3d 1052, 1056 (9th Cir. 1997) ("*Craigo* was not signed by a majority of the Nevada Supreme Court, leaving it with no precedential value.")

[5] Even if petitioner's asserted conflict exists based on the plurality opinion of the Nevada Supreme Court, this Court's cases recognize that formal title to streets and sidewalks often rests with the abutting landowner. Despite the conclusion reached by the Nevada Supreme Court, this factor has never been thought to affect the public forum determination. *See*, n.2, *supra*.

III. DESPITE THE PENDANCY OF *VIRGINIA v. HICKS*, THIS COURT SHOULD NOT GRANT *CERTIORARI* IN ORDER TO DETERMINE WHEN A PUBLIC FORUM CAN BE CLOSED

According to petitioner, this Court's pending case in *Virginia v. Hicks*, 123 S.Ct. 990 (2003), may decide the circumstances under which a public forum can be closed. Petitioner recognizes, as we do, that the public forum issue may not even be decided in *Hicks* since the public forum determination did not figure in the decision below. Petitioner nevertheless argues that a decision in this case should be postponed pending the outcome of *Hicks*. Petitioner speculates that a decision in *Hicks* will resolve the issue definitively in its favor. We respectfully disagree since the facts in the two cases are completely at odds.

Alternatively, petitioner asserts that if the public forum issue is not decided in *Hicks*, the Court should grant *certiorari* and resolve the issue of when the government can close a public forum. But this case does not present an appropriate record to resolve that issue. Here, there is not only a reserved easement but also a factual finding that the easement in practice continues to fulfill its intended and historic function as a public thoroughfare. Even petitioner has never claimed that this factual finding is clearly erroneous. The Court might someday want to consider a case in which there has been an unencumbered transfer of title from public to private ownership. However, that issue is not presented by these facts.

Given the record in this case, petitioner is unlikely to benefit from a decision on the public forum issue in *Hicks* – regardless of the outcome. A holding that the Housing Authority's streets in that case are still a public forum

because they continue to function as public streets would obviously not help petitioner. Likewise, a holding that the Housing Authority streets in *Hicks* are no longer a public forum because they no longer function as public streets would not help petitioner because of the contrary factual findings in this case.

Petitioner's view is that the government always retains authority to close a public forum by, among other things, selling the property. *See Int'l Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 699-700 (1992) (Kennedy, J., concurring). We have no quarrel with this general observation, but clearly it must be understood in the context of the overriding principle that "wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purpose of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring). Streets and sidewalks are "those areas of public property that may be considered, generally without further inquiry, to be public forum property." *United States v. Grace,* 461 U.S. 173, 179 (1983). The government cannot overcome that presumption by mere fiat; "it must alter the objective physical character or physical uses of the property, and bear the attendant costs." *Lee,* 505 U.S. at 700. Neither the fact that legal title to the streets has passed from the City to the petitioner nor the fact that the sidewalks no longer look like traditional curb and gutter sidewalks negates the public forum status of municipal sidewalks under circumstances where, as here, they continue to have the essential form and function of municipal sidewalks by design and by Deed.

There has been no fundamental alteration in the objective physical characteristics or uses of the property other than the fact that the sidewalks now pass over a pedestrian plaza that petitioner has built on what used to be

Main Street. Although the sidewalks do not resemble traditional curb and gutter sidewalks, they continue to serve as a pedestrian throughway for downtown commuters, shoppers, and visitors. The Plaza itself is not unlike pedestrian malls in other cities. It features flower beds, benches, a fountain, and statues of historical interest, including a large statue of Utah founder and Mormon leader Brigham Young. This statue has stood on an island in the middle of Main Street for decades. The Plaza anchors the north end of downtown and is a central thoroughfare between the commercial district to the south and the residential area immediately to the north. The State Capitol and other government buildings lie just a little further north. The sidewalks remain part of the downtown transportation grid and are freely accessible to the general public. To the extent the sidewalks provide access to petitioner's buildings or a view of religious imagery and statuary, the former public street and sidewalks did the same, just as many public streets and sidewalks across the country abut religious property. Similarly, to the extent the sidewalks provide access to the Church campus as an end destination for tourists, the former sidewalks along Main Street similarly did. 308 F.3d 1126-1130.

The Court should not grant *certiorari* in order to resolve what petitioner erroneously characterizes as the "struggle" in the lower courts over the issue of how a government may properly close a public forum. We do not understand the lower courts to have struggled with this issue and see no evidence of a conflict in the Courts of Appeals. The petitioner cites no such cases. Moreover, this case does not clearly present that issue since petitioner voluntarily agreed to keep its property open. Finally, we emphasize that absent any plausible basis to believe that the outcome in *Hicks* will lead to a different outcome in this case, the Court should reject petitioner's reliance on *Hicks* as grounds for granting *certiorari* in this case.

IV. THIS CASE DOES NOT IMPERIL THE RIGHTS OF PROPERTY OWNERS OR INTERFERE WITH MUNICIPAL GOVERNMENT AS ASSERTED BY PETITIONER

Petitioner greatly exaggerates the legal significance of the issue in this case and attempts to draw the Court into an abstract dispute about the imperilment of property rights and the danger to the administration of government.[6] The property rights asserted by petitioner are not absolute. Its rights are subject to the government's property interest secured by the easement. Dedications of land for streets, sidewalks and parks are common practice in real estate development. *See n.2, supra.* The decision in this case poses no more a threat to petitioner's asserted property interests than this common practice. The decision simply ensures that municipalities do not surrender the public's First Amendment rights even for other public benefits such as urban renewal or, as here, revenue from the sale of public property. While every easement may not create a public forum, this case involves Main Street and nothing more. Easements involving access to public beaches, parks, and hiking trails may raise different considerations but this case involves none of those properties.

What petitioner is really asking the Court to do is to analyze this case divorced from the facts and from the easement it voluntarily allowed the City to retain as part of the transaction involving the sale of the property. Petitioner seeks to totally distance itself from any constitutional requirements that flow from the existence and the operation

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[6] At the same time, petitioner understates how unusual this case is. How often will it occur that Main Street, U.S.A. or Fifth Avenue in New York is deeded away to a private entity, much less to a church. The development of public forum law should not rest on such unique facts.

of the easement. But expressive activities have been historically compatible with, if not virtually inherent in, property dedicated to general pedestrian passage. The two uses cannot be disengaged. The court below correctly rejected this attempt by both the City and the petitioner to sidestep the constitutional obligations that flow from the operation of streets and sidewalks.

The petitioner and the City cannot have it both ways. Once having reserved the easement, the City cannot walk away from its constitutional obligations. Similarly, once having agreed to the easement, the petitioner has no say in the matter. Holding the City and the petitioner to constitutional requirements under the circumstances present in this case is hardly controversial. The decision below does not break new ground, nor does it present the grave danger to private property interests that petitioner asserts. If petitioner has a quarrel, it is a quarrel with the City about the easement, not a quarrel with the Tenth Circuit about the law. As the Tenth Circuit recognized, the law is clearly established that public streets are often easements held for the public. *See n.2, supra.* Contrary to petitioner's claim, the right to assemble and communicate in such places may not be abridged or denied regardless of the formalities of ownership. By taking title subject to the City's easement, petitioner's property is encumbered by the First Amendment constraints that flow from the easement.[7]

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[7] Formalities of title do not control the public forum analysis. *Hague v. CIO*, 307 U.S. at 515 ("wherever the title of streets and parks may rest, they have immemorially been held in trust for use by the public..."); *cf. Marsh v. Alabama,* 326 U.S. 501, 506 (1946) ("ownership does not always mean absolute dominion.") *See also Evans v. Newton,* 382 U.S. 296, 302 (1966) (mere fact of private ownership was not enough to divest the park of its "public character"; the Fourteenth Amendment applied "regardless of who now has title under state law"). Simply declaring an entity to be private "does not alter its characteristics so as to make it something more than it actually is." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 393 (1995).

Finally, petitioner's argument that the City's enforcement of the easement will run afoul of the Establishment Clause is totally without merit. Municipalities routinely enforce local laws governing conduct on the streets and sidewalks within their jurisdiction. Many of these laws directly target First Amendment activity. We are aware of no principle of law that would prevent the enforcement of those laws on the streets and sidewalks that run past the local church or synagogue just because title to the streets may or may not rest with the abutting landowner. Yet, that seems to be the position that petitioner has staked out by asserting that any government oversight over the sidewalks presents both *entanglement* and *endorsement* problems under the Establishment Clause. This concern is more fanciful than real particularly since petitioner has neither the authority nor the right to make decisions involving conduct and other First Amendment activity on the City property that runs over the Plaza. This responsibility is reserved to the City.

Petitioner's argument turns the Establishment Clause argument on its head. It is plaintiffs who have asserted an *entanglement claim* based on the terms of the easement allowing the petitioner to exert editorial control over what is said, who gets to speak, and under what circumstances speech is permitted. Allowing petitioner to make these decisions involving speech conducted on public property is a function that is reserved to the government. *See Larkin v. Grendel's Den Inc.*, 459 U.S. 116, 122-23 (1982). Although the Court of Appeals found it unnecessary to resolve this claim based on its disposition of the case on public forum grounds, it is no answer to this very serious claim that the Court is powerless to remedy it or the First Amendment claim because it creates a separate *entanglement* problem that is more fanciful than real.

CONCLUSION

For the reasons states above, the writ of *certiorari* should be denied.

Respectfully Submitted,

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